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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JIMMY MIRANDA, Defendant and Appellant.	H044319 (Santa Clara County Super. Ct. No. C1516917)

A jury convicted defendant of two counts of attempted voluntary manslaughter and other offenses resulting from an encounter with police officers on a late night in downtown San Jose. Defendant challenges the admission of post-arrest statements, the sufficiency of the evidence to support attempted carjacking, and the finding that a juvenile assault adjudication qualified as a prior strike. Defendant also seeks remand for resentencing in light of recent statutory amendments making specified sentencing enhancements discretionary. Finding no error and no purpose to be served by a remand, we will affirm the judgment.

I. BACKGROUND

City of San Jose Police Officers Gensole and Yuen were patrolling the convention center lightrail station platform in downtown San Jose. As midnight approached, Officer Gensole boarded a train to confirm all passengers had paid their fare, prompting defendant and several others to deboard. As the others approached a kiosk to purchase tickets, defendant walked in the opposite direction toward a station exit. When Officer

Gensole asked where he was going, defendant quickened his pace and said he was going to buy a ticket, but Officer Gensole knew there were no kiosks in that direction. He followed defendant and asked why he was leaving. Defendant said he had a gun and broke into a sprint. He ignored Officer Gensole's command to stop, and as a foot pursuit began, Officer Gensole saw a gun in his hand.

Officers Gensole and Yuen pursued defendant down an alleyway and through a parking garage to Almaden Boulevard. Defendant and Officer Gensole exchanged gunfire, and defendant was seen brandishing a gun at the driver of a car at a stop light. The car proceeded through the intersection, and defendant ran into another parking garage where a man was waiting in a parked sedan for his wife. Defendant pulled the man from the sedan at gunpoint, drove out of the garage, and led several officers on a high speed chase on city streets, Highways 101 and 85, and into a residential neighborhood in south San Jose.

Defendant avoided officers maneuvering their cars to block his passage. He side-swiped a patrol car, fired his gun, and rear-ended an SUV, all before hitting a utility pole. He emerged from the sedan, bleeding, with his hands raised, saying "don't shoot," but he ignored commands to "stop" and "get on the ground." He was tased as he ran, fell face down on the pavement, and was "dog piled" by several officers. He ignored further verbal commands and continued to struggle. He was hit and kicked multiple times by several officers, tased a second time, subdued, handcuffed, and transported to the hospital. The next morning, with his arm in a cast, bruises and cuts on his face, and two front teeth knocked out, he was booked into jail.

Defendant was charged with four counts of attempted murder of a peace officer. (§§ 664, 187; undesignated statutory references are to the Penal Code.) Counts 1 and 2 involved defendant shooting at Officers Gensole and Yuen during the foot pursuit. Count 3 involved defendant firing his gun from the sedan while pursued by Officer Lee, and count 4 involved defendant nearly hitting Officer Barthelemy during the car chase.

Defendant was charged with two counts of assault with a deadly weapon (a car) on a peace officer. (§ 245, subd. (c).) Count 5 involved the same conduct as count 4, and count 10 involved hitting a fifth officer's patrol car with the sedan while continuing to evade officers. The information charged defendant with carjacking (§ 215; count 6), attempted carjacking (§§ 664, 215; count 7), assault with a deadly weapon against the occupants of the SUV (§ 245(a)(1); count 8), reckless driving (Veh. Code, § 2800.2; count 9), shooting at an occupied vehicle (§ 246; count 11), possession of a firearm by a felon (§ 29800(a)(1); count 12), prohibited possession of ammunition (§ 30305(a)(1); count 13), and resisting arrest (§ 148; count 14). Two prior strikes (one juvenile and one adult) were alleged under section 667, subdivisions (b) through (i) and section 1170.12; gun use enhancements were alleged under section 12022.5 and section 12022.53; and a prior serious felony conviction was alleged under section 667, subdivision (a).

At trial, the prosecution presented testimony from 18 police officers all having some involvement in defendant's apprehension, two police officers to whom defendant had made statements after being treated at the hospital, four civilian witnesses, and several crime scene investigators and criminalists.

Defendant called two other officers involved in his pursuit and physical restraint. He conceded the reckless driving, resisting arrest, unlawful possession of a firearm, and unlawful possession of ammunition charges. Defense counsel argued that defendant had fired the handgun during the foot chase in self-defense, that the prosecution had failed to prove defendant acted with the intent to kill or assault anyone, that defendant's statements the next morning did not reveal a previously harbored intent but were made in response to being beaten by officers during his arrest, and that the carjacking counts were not proven due to contradictory and insufficient evidence.

The jury found defendant guilty of the lesser included offense of attempted voluntary manslaughter as to counts 1 and 2, and the lesser included offense of assault with a deadly weapon as to count 5. Defendant was found guilty of counts 6 through 10

and counts 12 through 14, and the gun use enhancements were found true. He was found not guilty of counts 3 and 4 (attempted murder of Officers Lee and Barthelemy) and count 11 (shooting at an occupied vehicle). Defendant admitted the prior serious felony and the adult strike prior, and after a court trial the juvenile adjudication was found to have been shown. Defendant was sentenced to 177 years to life, consecutive to 81 years,[1] and ordered to pay restitution.

II. DISCUSSION

A. DEFENDANT'S POST-ARREST STATEMENTS TO POLICE

Defendant argues that the trial court violated his right to due process by admitting statements he had made at the hospital and during the booking process expressing hatred and animosity toward law enforcement. The court admitted defendant's statements as probative of his state of mind the night before, but it excluded a recording of those statements. The trial court found defendant "came across as a huge jerk in the recording," which had a high potential for inflaming the jury.

Officer Dorris testified that he was in defendant's hospital room the morning after the arrest. When defendant woke and noticed the officer, he looked at him and said "I hate the fucking cops." Sergeant Barg testified that he transported defendant from the hospital to a processing center where he asked defendant a series of medical and safety-related intake questions. The sergeant described defendant as hostile and belligerent during the intake process, personally attacking and insulting the officers. Defendant "made a statement about how nobody likes us, including our families, and he made

[1] Defendant was sentenced under the three strikes law to a 27-year-to-life base term on count 6, and consecutive 25-year-to-life terms on counts 1, 2, 5, 7, 8, and 10. He was sentenced to consecutive five-year terms on each of those counts under section 667, subdivision (a) (prior serious felony), and consecutive 10-year terms on counts 1 and 2 (§ 12022.5, subd. (a)) and counts 6 and 7 (§ 12022.53, subd. (b)) for the use of a firearm. Defendant was sentenced to a consecutive six-year term on count 9, concurrent six-year terms on counts 12 and 13, and six months (deemed served) on count 14.

another statement about how he hopes that gang members do something bad to us, or I believe he said that 'fuck us up[.]' " Defendant told Sergeant Barg, " 'That's why I want to kill you guys like Officer Johnson. That's what happens to you guys, that's what you get, because you are dicks.' " Sergeant Barg understood defendant to be referring to San Jose Police Officer Michael Johnson who had been shot and killed in the line of duty a few months previously.

Evidence Code section 210 defines relevant evidence as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evidence Code section 352 gives trial courts discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." " 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' " (*People v. Callahan* (1999) 74 Cal.App.4th 356, 371.) The trial court is vested with wide discretion to determine relevance and to weigh the prejudicial effect of proffered evidence against its probative value. (*People v. Edwards* (1991) 54 Cal.3d 787, 817.) We will not disturb the ruling on appeal unless the trial court exercised its discretion "in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.) Due process is compromised when evidentiary error makes the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)[2]

[2] Defendant argues that his trial counsel was ineffective for not federalizing his objection to the admission of his statements. The argument is unfounded. Although defendant did not raise a due process claim in the trial court, the claim is not forfeited on appeal because it is based on an asserted error having the additional consequence of violating his right to due process. (*People v. Partida*, *supra*, 37 Cal.4th 428, 435.)

Defendant acknowledges the admitted statements have some degree of relevance, noting *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1138 (post-offense statement that the defendant wanted to kill a police officer relevant to state of mind at time of offense). As in the trial court, he argues here that the probative value of the statements is substantially outweighed by prejudice under Evidence Code section 352. He argues he made the statements while in pain and under the influence of morphine after a severe police beating, and his antipathy toward law enforcement was "the predictable result of his treatment at their hands and not particularly probative of an intent to kill or harm the officers." Defendant argues that the evidence of intent to kill Officers Gensole, Yuen, and Barthelemy was so thin that his statements to Officer Dorris and Sergeant Barg took on greater significance, prejudicing him under any standard. Regarding the gunfire exchange with Officer Gensole, he points out that the evidence was conflicting as to who fired first, he never advanced on Officer Gensole, and his actions were consistent with self-defense. Regarding the assault on Officer Barthelemy, he argues that footage from a residential security camera shows him driving past Officer Barthelemy, refuting the claim that he intended to strike the officer with the sedan.

We find no abuse of discretion or undue prejudice resulting from the admission of defendant's statements as related by Officer Dorris and Sergeant Barg. The statements demonstrate an animus toward law enforcement, and were therefore relevant to defendant's motive, knowledge, and mental state during the commission of the offenses. Defendant's reference to "nobody" liking the police suggests he was not merely reacting to the previous night's events, but had a pre-existing opinion he considered a shared view of law enforcement. And the audio recording, which might have evoked an emotional bias against defendant, was not played for the jury. We find nothing unique in the officers' testimony alone to render the statements unduly prejudicial.

Nor did the evidentiary ruling result in a fundamentally unfair trial. Counsel was able to cross-examine Officer Dorris and Sergeant Barg to develop the theory that the

statements did not reflect motive or intent. He elicited from Officer Dorris that defendant had been treated in the emergency room, his arm was in a sling, his face was bruised, cut, and scraped, his teeth were knocked out, and he complained of pain. Sergeant Barg testified similarly that defendant said he was on morphine and complained of pain, his arm was in a cast, and his face was bruised and scraped. Defense counsel argued to the jury that defendant's only statement regarding killing was made in the present tense to Sergeant Barg when defendant was upset, angry, and in pain, only hours after being beaten by officers. The jury was thus fully apprised of the circumstances under which defendant made the statements, and it was able to evaluate them in context and relative to all evidence in the case.

B. EVIDENCE OF ATTEMPTED CARJACKING

Defendant challenges the sufficiency of the evidence supporting count 7, attempted carjacking. Officers Yuen and Gensole, and a third witness observing defendant from a police helicopter (Officer Kubasta) testified regarding the attempted carjacking. Defendant argues that none of the testimony establishes "an unambiguous intent on [his] part to take the unknown driver's car, much less take it by force or fear."

We review sufficiency of the evidence challenges for substantial evidence: " ' "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' [Citation.] '[The] appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citations.] 'Evidence is sufficient to support a conviction only if it is substantial, that is, if it " 'reasonably inspires confidence' " [citation], and is "credible and of solid value." ' [Citation.]" (*People v. Fromuth* (2016) 2 Cal.App.5th 91, 103–104.)

"An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) Thus, attempted carjacking requires the specific intent to take a vehicle not one's own; from the immediate presence of a person possessing the vehicle; against that person's will; using force or fear to accomplish the taking; intending to deprive that person of the vehicle either temporarily or permanently. (§ 215, CALCRIM No. 1650.) The accompanying act required is "a direct but ineffective step [¶]…[¶] that goes beyond planning or preparation and shows that a person is putting his or her plan into action," and "indicates a definite and unambiguous intent to commit [carjacking]." (CALCRIM No. 460.) A person is guilty of attempted carjacking "even if, after taking a direct step towards committing the crime, … his or her attempt failed or was interrupted by someone or something beyond his or her control." (*Ibid*.)

Officer Yuen testified that from a distance of about 100 feet, he saw defendant run north on Almaden, cross the eastbound lanes of Park Avenue, and stop on the median where a westbound car was waiting at the light to turn left. He described the vehicle as "like a van or an S.U.V.," but he did not recall the make or model. Officer Yuen testified that defendant "approached the driver's side window and knocked on the door or on the window of the vehicle with his right hand with his gun in his hand," and he "used the bottom of his, I guess, hand and he was knocking on the window." Defendant appeared to be "in a frantic state" based on his movements. When asked whether he could hear what was being said, Officer Yuen testified he could not hear anything. "[A]nything at all?" the prosecutor pressed. Officer Yuen clarified, "I could still hear things, but I couldn't hear specifically what [defendant] was saying." After the car "took off pretty quickly," turning left onto Almaden, defendant approached a second car—"It looked like he was trying to knock on the window again"—but that car did not stop. On cross-examination Officer Yuen agreed that by using the butt of the gun to tap on the window,

the barrel of the gun would necessarily be pointing toward the sky. He also described streetlights spaced about 20 feet apart along Almaden in the Park Avenue vicinity.

Officer Gensole testified that defendant approached what he recalled was a dark red four-door sedan, contacting "the driver's side door with his open palm, left hand." Defendant "started to knock on the window, and then with his right hand, holding a firearm, he was pointing a gun at the driver." He described defendant's knock as "an alarm, kind of a panic, slapping of the palm" on the window. At the same time, defendant was "banging the firearm into the window" with his right hand. Defendant was yelling, "like he was in a panic," and in "a kind of ordering mode," but Officer Gensole could not make out any words. When asked whether he saw the gun pointed "at the driver's seat location," Officer Gensole said "[y]es," as defendant was "yelling, screaming, and trying to communicate to the driver." On cross-examination, Officer Gensole clarified that defendant was holding the gun against the window, but he could not remember whether it was pointing up or down. He testified that it was dark, but there were streetlights and pedestrian lighting in the area.

From a helicopter about 500 feet overhead, Officer Kubasta observed defendant running north on Almaden toward Park Avenue. Defendant ran into the intersection where "there was one lone vehicle," which Officer Kubasta "believe[d] … was a white S.U.V." Defendant "ran around the front of the white S.U.V. to the passenger door and began pulling on the passenger door like he was trying to get in." The vehicle "fled westbound on Park and continued out of the area." Officer Kubasta explained: "I could see [defendant] was trying to get into the vehicle. Other than that, I couldn't see a whole lot of what was going on specifically; we didn't have [] the best lighting at that point." He could see gross motor movements from his vantage, but the helicopter's spotlight could not keep pace with low-flying quick turns.

Our standard of review requires us to presume the jury drew all reasonable inferences that could support its finding that defendant intended to take a vehicle at the

Park and Almaden intersection against the driver's will by force or fear. Defendant's contact and interaction with the driver, as described by Officers Gensole and Yuen, is substantial evidence of an unambiguous direct step toward the carjacking. And the jury reasonably could have inferred defendant's specific intent from that testimony: As he was being pursued on foot by the officers moments before carjacking the sedan at gunpoint, defendant brandished his gun at the driver of another vehicle stopped at the intersection, and banged on the window with his hands and the gun while shouting at the driver.

Defendant argues that the evidence is ambiguous because Officers Gensole and Yuen observed him in the dark from a distance of about 100 feet, Officers Gensole and Yuen provided inconsistent accounts as to whether the gun was pointed at the driver, and there was no evidence that he demanded the vehicle or that the driver was aware of him or his gun. But the testimony of Officers Gensole and Yuen was largely consistent, and any inconsistent testimony of Officer Kubasta could reasonably be attributed to the lighting conditions he described. Officers Gensole and Yuen, however, testified to sufficient lighting in the area. The jury could infer that a demand was made from defendant's "screaming and yelling," his frantic state, and brandishing a gun against the driver's window, regardless of how the gun was positioned.

C. THE JUVENILE STRIKE

Defendant challenges the trial court's finding that his juvenile adjudication for assault under former Penal Code section 245, subdivision (a) qualified as a strike within the meaning of sections 667 and 1170.12. Specifically, he argues that the prosecution failed to show as required by section 667, subdivision (d)(3)(D) that he had been adjudged a ward of the juvenile court for committing an "assault by any means of force likely to produce great bodily injury" under Welfare and Institutions Code section 707, subdivision (b)(14).

To qualify as a strike, a juvenile adjudication must be for a serious felony under section 1192.7, subdivision (c), a violent felony under section 667.5 subdivision (c), or for a listed offense under Welfare and Institutions Code section 707, subdivision (b) (offenses for which certain minors may be tried as adults). (§§ 667, subd. (d)(3)(B), 1170.12, subd. (b)(3)(B).) In addition, "the record of the prior juvenile proceeding [must] show[] that the adjudication of wardship was premised at least in part upon an offense listed in Welfare and Institutions Code section 707(b)." (*People v. Garcia* (1999) 21 Cal.4th 1, 6; §§ 667, subd. (d)(3)(D), 1170.12, subd. (b)(3)(D).) Welfare and Institutions Code section 707, subdivision (b) includes "Assault with a firearm or destructive device," (para. 13) and "Assault by any means of force likely to produce great bodily injury," (para. 14) but it does not include assault with a deadly weapon other than a firearm, such as a knife, unless committed with force likely to produce great bodily injury.

The wardship adjudication at issue arises from defendant admitting a juvenile petition alleging that on or about January 10, 2007, when he was 17 years old, "the crime of ASSAULT WITH A DEADLY WEAPON OR BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY INJURY, in violation of Penal Code section 245(a)(1), a Felony, was committed by JIMMY MIRANDA who did commit an assault upon the person of [Jane Doe] with a deadly weapon and instrument other than a firearm, a(n) knife, and by means of force likely to produce great bodily injury." (Capital typeface in original.) Defendant argues that he "admitted the petition as charged, meaning he pled to a code section punishing alternative types of conduct,"[3] and that his admission was

[3] In 2007, Penal Code section 245, subdivision (a)(1) proscribed "assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury." In its current form, assault with a deadly weapon or instrument other than a firearm is proscribed under subdivision (a)(1), and "assault … by any means of force likely to produce great bodily injury" is proscribed under subdivision (a)(4).

therefore insufficient to establish a strike prior under *People v. Watts* (2005) 131 Cal.App.4th 589, 596 (presuming offense not a strike if it can be committed in different ways, one or more of which is not a strike).

Defendant's argument ignores that the allegation he admitted was phrased in the conjunctive, not the alternative. He admitted to committing an assault with a deadly weapon (a knife) "*and* by means of force likely to produce great bodily injury." (Italics added.) His reliance on *People v. Watts*, addressing offenses pleaded in the alternative, is therefore misplaced. Instead, we find *People v. Mendias* (1993) 17 Cal.App.4th 195, cited by the Attorney General, analogous and instructive here. In that case, the prosecution established that by pleading guilty to an information alleging he had committed robbery " 'by force *and* fear,' " the defendant committed robbery "involving the use of force" for purposes of section 667.7, subdivision (a). (*Mendias*, at p. 204.) The *Mendias* court rejected the notion that the guilty plea admitted only the minimum requirement of the offense, concluding instead that the guilty plea admitted not only every element of the offense charged, but also all allegations and factors comprising the charge contained in the pleading. (*Ibid*.) As in *Mendias*, we conclude defendant's admission here forecloses his failure of proof argument. (Because we resolve this issue based on the scope of defendant's admission, it is unnecessary for us address defendant's challenge to this court's holding in *In re Pedro C*. (1989) 215 Cal.App.3d 174, 182–183, embraced by the trial court, that Welfare and Institutions Code section 707, subdivision (b)(14) extends to all assaults with deadly weapons or instruments charged under Penal Code section 245.)

D. AMENDED PENAL CODE SECTIONS 12022.5, 12022.53, 667, AND 1385

Defendant received four 10-year firearm enhancements (§§ 12022.5, subd. (a) [counts 1 and 2]; 12022.53, subd. (b) [counts 6 and 7]), and seven five-year enhancements for prior serious felonies (§ 667, subd. (a)(1) [counts 1, 2, 5–8, 10]). He

argues the matter should be remanded for resentencing in light of statutory amendments giving the trial court discretion to strike or dismiss the enhancements.

At the time defendant was sentenced, sections 12022.5 and 12022.53 prohibited a trial court from striking "an allegation under this section or a finding bringing a person within the provisions of this section." (Former §§ 12022.5, subd. (c); 12022.53, subd. (h).) Both sections were amended (with identical language) while this appeal was pending. Effective January 1, 2018, "in the interest of justice pursuant to Section 1385 and at the time of sentencing," the trial court may "strike or dismiss an enhancement otherwise required to be imposed by this section." (§§ 12022.5, subd. (c); 12022.53, subd. (h); Stats. 2017, ch. 682, §§ 1, 2.) More recently, section 667, subdivision (a)(1) and section 1385 were amended, giving the trial court discretion to strike or dismiss a prior serious felony enhancement effective January 1, 2019.[4] (Stats. 2018, ch. 1013, §§ 1, 2.)

The parties agree that the amendments apply retroactively here because they are ameliorative and defendant's judgment was not (or will not be) final on their effective dates. (*In re Estrada* (1965) 63 Cal.2d 740, 744–748 [new statute imposing lesser punishment applies retroactively to nonfinal judgments]; *People v. Francis* (1969) 71 Cal.2d 66, 75–78 [new statute authorizing sentencing discretion retroactively applies to nonfinal judgments].) They disagree, however, as to whether a remand is warranted for the court to exercise the newly authorized discretion.

Citing *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 (*Gutierrez*), the Attorney General argues that resentencing is not required because the record demonstrates the trial court would not have elected to strike the enhancements had defendant been sentenced after the amendments. The court in *Gutierrez* addressed

[4] We reject the Attorney General's argument that defendant's claim is not ripe as to the most recent statutory amendments, given that the new law will be in effect by the time of any resentencing.

whether a sentencing remand was required in light of *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, issued while the appeal was pending and holding that trial courts retain discretion under section 1385 to strike prior conviction allegations brought under the three strikes law. (*Romero,* at pp. 529–530.) The *Gutierrez* court concluded that resentencing is warranted when a trial court believed it did not have discretion, "unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." (*Gutierrez*, at p. 1896.) The court found resentencing was not required in *Gutierrez* because the trial court in that case had increased the sentence beyond what it believed was required by the three strikes law (by imposing an upper term and two additional discretionary one-year enhancements) and had stated that imposing the maximum sentence was appropriate. (*Ibid*.) Thus, "no purpose would be served in remanding for reconsideration." (*Ibid*.)

In *People v. McDaniels* (2018) 22 Cal.App.5th 420, the appellate court applied the *Gutierrez* court's standard regarding the same statutory amendment at issue here. (*Id*. at p. 425.) There, the court remanded for resentencing where the defendant received a term of 25 years to life for a firearm enhancement consecutive to a 25-year-to-life term for murder, a concurrent term of two years for possession of the firearm, and stayed 20- and 10-year terms for two other firearm enhancements. (*Id*. at p. 423.) The court in *McDaniels* recognized that a remand is an idle act when "the egregiousness of a defendant's crimes, a defendant's criminal history, and the court's sentencing options and rulings [] prompt the court to express its intent to impose the maximum sentence permitted." (*Id*. at p. 427.) In that case, however, the trial court had expressed no intent to impose the maximum sentence; it imposed the middle-term for firearm possession, and ran that term concurrent to the term for the murder, and it struck four prior convictions in the interest of justice. (*Id*. at p. 428.) Similarly in *People v. Almanza* (2018) 24 Cal.App.5th 1104, following *Gutierrez* and *McDaniels,* the court remanded for

resentencing because the imposition of consecutive sentences was not a clear indicator of how the trial court would rule on remand. (*Id*. at pp. 1110–1111.)

The Attorney General points to the trial court's exercise of discretion when it imposed the 10-year gun use enhancements for counts 1 and 2. The trial court here already had discretion under Penal Code section 12022.5, subdivision (a) to impose 3, 4, or 10-year gun use enhancements for counts 1 and 2. In exercising its discretion, the court selected aggravated 10-year terms, noting its view that the aggravating factors listed in California Rules of Court, rule 4.421(a)(1), (b)(1), (b)(2), (b)(3), (b)(4), and (b)(5) predominated over the mitigating factors.[5]

The Attorney General argues that the trial court's denial of defendant's *Romero* motion and its closing comments at sentencing also demonstrate the certainty of defendant's sentence. In denying the motion to strike one or both prior strike convictions, the court described defendant's conduct as a "rampage" and "exceptionally dangerous and reckless," noted defendant's significant and continuing criminality, and considered defendant to be a continuing danger to the community. And the trial court concluded the sentencing hearing by emphasizing defendant's "exceptionally violent and dangerous conduct in this case" and commenting that the sentence is "appropriate given the risk to our community." Defendant argues that remand is warranted under *Gutierrez* because the trial court "did not state it would not have exercised such discretion had the enhancements not been mandatory." We reject defendant's narrow view of *Gutierrez* and the low bar urged for sentencing remands notwithstanding a trial court's stated reasons for a given sentence.

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[5] The factors in aggravation found by the trial court are: the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; defendant engaged in violent conduct indicating a serious danger to society; defendant's convictions are of increasing seriousness; defendant has served a prior prison term; and defendant was on probation or parole when the crime was committed.

In contrast to *McDaniels* and *Almanza*, we believe the record here is clear that the trial court would not dismiss any enhancement even if it had the opportunity to do so. (See *People v. Gamble* (2008) 164 Cal.App.4th 891, 901.) The trial court had discretion to impose lesser three- or four-year gun use enhancements on counts 1 and 2 (§ 12022.5, subd. (a)), and determinate lower terms (32 months) or middle terms (four years) on counts 9, 12, and 13 (§§ 667, subd. (e)(1), (2)(C), 1170, subd. (h)(1)). Yet it declined to mitigate defendant's sentence, instead imposing the maximum 10-year gun use enhancements on the attempted voluntary manslaughter counts and selecting the upper term of six years for counts 9, 12, and 13 (although we acknowledge that the sentences on the possession charges in counts 12 and 13 are concurrent). The court also declined to strike one or both prior strike convictions, which could have reduced the sentence by decades. After imposing an aggregate sentence of 177 years to life consecutive to 81 years, the trial court observed: "Mr. Miranda is going to spend the rest of his life in prison. And as indicated based on the sentence, I think it's appropriate given the risk to our community." No purpose would be served by a sentencing remand.

III. DISPOSITION

The judgment is affirmed.

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Grover, J.

WE CONCUR:

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Greenwood, P. J.

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Bamattre-Manoukian, J.